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NO. 1265

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IN THE

Supreme Court of the United States

BELL TELEPHONE LABORATORIES, INCORPORATED, AND DOUGLAS AIRCRAFT COMPANY, INC., *Appellants,*

v.

BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, ET AL., *Appellees.*

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO.

BELL TELEPHONE LABORATORIES, INCORPORATED, AND DOUGLAS AIRCRAFT COMPANY, INC., *Appellants*

v.

BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, ET AL., *Appellants,*

JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of the Supreme Court of the State of New Mexico entered on November 28, 1966, upholding the validity of the New Mexico Emergency School Tax Act as applied to the appellants against the contention that it violated the United States Constitution and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of the State of New Mexico is reported at ....N.M....., ...P.2d..... A copy of the opinion is annexed hereto as Appendix A.

JURISDICTION

This action was instituted in the District Court of Santa Fe County, New Mexico, for the recovery of emergency school tax assessed against appellants and paid under protest by them, on the grounds that such tax as applied

to the appellants violated the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of Article I, §8, of the United States Constitution. The Decision of the District Court sustained the validity under the United States Constitution of the Emergency School Tax Act (see STATUTES INVOLVED below) as applied to the appellants. That Decision was affirmed by the Supreme Court of the State of New Mexico on November 28, 1966, and Notice of Appeal was filed in that court on February 14, 1967. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, §1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *General Motors Corp.* v. *Washington*, 377 U.S. 436, *American Oil Co.* v. *Neill*, 380 U.S. 451.

QUESTIONS PRESENTED

1. Does the Commerce Clause of Article I, §8, of the United States Constitution prohibit New Mexico from imposing its unapportioned privilege tax upon receipts from research and development activities in the state by appellants under cost-plus-fixed-fee type contracts for development of the NIKE series of missile systems for the United States Army, where (a) such activities are undertaken for the sole purpose of obtaining data needed to perform such contracts outside New Mexico, (b) such data cannot be used in the performance of such contracts within New Mexico but must, for such purpose, be transmitted to appellants' offices outside New Mexico and there combined with data obtained from similar research activities in other states, and (c) such activities constitute only five per cent of appellants' total work under such contracts?

2. Do the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibit New Mexico from imposing such tax upon such

receipts where appellants (a) do not advertise, sell, or distribute goods or perform services for others in New Mexico, (b) do not hold themselves out as engaged in business in that state, and (c) are there engaged only in research activities necessary to obtain data required for their performance of such contracts outside New Mexico?

3. Do the provisions of Sections 72-16-29 and 72-13-67, N.M.S.A. 1953, providing for injunctions against engaging in business until applicable taxes have been paid, open the Emergency School Tax Act "to the objection that it compels the company to pay for the privilege of engaging in interstate commerce" in violation of the Commerce Clause of Article I, §8, of the United States Constitution?

STATUTES INVOLVED

This appeal involves the validity of the New Mexico Emergency School Tax Act as applied to appellants. That Act was compiled as Sections 72-16-1 to 72-16-47 of the New Mexico Statutes Annotated, 1953 Compilation, at the time this action was commenced; Sections 72-16-16 to 72-16-18 and 72-16-20 to 72-16-47 were repealed by Chapter 248 of New Mexico Session Laws of 1965 as of January 1, 1966. Such repealed Sections are not relevant herein. The material provisions of the Act involved herein are Sections 72-16-2, 72-16-4.1, 72-16-4.9, and 72-16-29; they are set forth in full in Appendix B annexed hereto. Section 72-16-29 was repealed as of January 1, 1966, by Laws 1965, Chapter 248, which enacted, as of that date, a similar provision as Section 72-13-67; that Section also appears in Appendix B. Chapter 47 of New Mexico Session Laws of 1966 enacted the Gross Receipts and Compensating Tax Act, which will become effective on July 1, 1967, repealing on that date Sections 72-16-2 to 72-16-19. The tax here involved continues to accrue monthly, and the Gross Receipts and Compensating Tax Act will become applicable to appellants at its effective

date. The material provisions of that Act are Sections 72-16A-1 to 72-16A-5 of New Mexico Statutes Annotated, 1953 Compilation, 1966 Interim Supplement, which are set forth in full in Appendix B. The revision of the Emergency School Tax Act by the Gross Receipts and Compensating Tax Act is believed to be without constitutional significance.

STATEMENT OF THE CASE

This action was commenced in the District Court of Santa Fe County, New Mexico, to recover emergency school tax assessed against appellants by appellees and paid under protest by them. The federal question was presented by the complaint, which drew into question the validity of the Emergency School Tax Act on the ground of its being repugnant to the Constitution of the United States. Paragraph 13 of the complaint (R.6-7) alleged that such Act, if applicable to appellants, was invalid under the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of Article I, §8, of the United States Constitution. The complaint also alleged invalidity of such Act under the due process clause of Article II, §18, of the New Mexico Constitution, but no separate argument was made with respect thereto. The Decision of the District Court (R.92) upheld the applicability of such Act and the validity thereof against appellants' contention that it violated the United States Constitution. The Decision of the District Court was affirmed by the Supreme Court of New Mexico (see Appendix A hereto). The facts were stipulated or established by depositions included in the transcript of record on this appeal. The following factual summary is taken in large part from the Supreme Court opinion below.

The United States of America, Department of the Army, contracted with Western Electric Company, Incorporated (hereinafter called Western), for the design and development of a series of missile systems known as the Nike Ajax,

Nike Hercules, Nike Zeus, and Nike X. Appellant Bell Telephone Laboratories, Incorporated, a New York corporation (hereinafter called BTL), is committed by Western, its parent company, to perform Western's obligations under such contracts. BTL's work under the contracts consists of the design and development of the missile system as a whole. Under purchase orders issued by BTL to Douglas Aircraft Company, Inc., a Delaware corporation (hereinafter called DAC), DAC designs, develops, and fabricates test models of guided missiles and equipment for their handling and launching.

In the performance of their respective work, BTL and DAC conduct developmental tests of the system and its components. BTL and DAC have a choice in the location to be used. The choice depends upon the complexity of the test, the nature of the data required, and the capabilities and limitations of the location. Large-scale tests involving the firing of missiles are conducted in isolated locations for reasons of safety. White Sands Missile Range in New Mexico is selected for tests requiring complete ground instrumentation and recovery of the missile for examination after firing. The Atlantic Missile Range, including Cape Kennedy, Florida, and Ascension Island, is selected for tests of the radar tracking systems. The Pacific Missile Range, including Pt. Magu, California, and Kwajalein Island, is selected for tests involving live targets under conditions simulating combat.

BTL and DAC conducted tests in New Mexico on an intermittent basis from 1946 until the early 1950's and on a continuing basis thereafter. Employees of BTL and DAC are assigned to New Mexico only for the purpose of conducting the tests, but their average stay is two to four years.

Tests in New Mexico by BTL and DAC involve the shipment to White Sands Missile Range of a variety of equip-

ment for use in the test. The components of such equipment are assembled in New Mexico. The missile is launched. Performance of the missile in flight and of other parts of the system is recorded by telemetry and other data collection procedures. Such data are cursorily examined in New Mexico. Data relating to the performance of the guidance system and radars are then sent to BTL's laboratory at Whippany, New Jersey, for reduction and analysis, and data relating to the missile and its launching and handling equipment are sent to DAC's plant at Santa Monica, California, for similar reduction and analysis.

In the case of both BTL and DAC the data resulting from tests in New Mexico are not useful to them until such data have been reduced and analysed at their respective facilities in New Jersey and California. Moreover, such data alone are insufficient to guide development of the missile system. It is necessary that such data be studied and used in conjunction with data resulting from tests at other missile ranges and laboratories; such study and use occurs outside New Mexico.

Neither BTL nor DAC maintains an office in New Mexico. All contracts involved were negotiated and entered into outside New Mexico. The Army furnishes BTL with temporary headquarters for use in connection with the New Mexico tests, and BTL furnishes DAC temporary headquarters for the same purpose. The only property owned by BTL and DAC that is involved is miscellaneous personal property used in connection with the tests.

Only five per cent of the total work involved in the design and development of the missile systems takes place in New Mexico. Apart from their New Mexico testing activities, neither BTL nor DAC holds itself out as engaged in business in New Mexico. They do not advertise, sell, or distribute goods in New Mexico, nor do they attempt to obtain any other business in New Mexico.

DAC bills BTL for its work. Western bills the Government for BTL's work. The total of such bills includes costs and fees arising from activities with New Mexico, but such bills do not segregate or attribute any part of the costs or fees to activities within New Mexico or any other state. The amount of New Mexico payrolls, some material costs and some items of indirect costs incurred in New Mexico are ascertainable from the records of the appellants.

DAC's tax was computed under Section 72-16-4.9, N.M.S.A. 1953, on the amount of its payroll expense in New Mexico, its payroll tax on the New Mexico payroll, plus 6% of the total of these two items. The 6% was estimated to be the fee earned by DAC thereon. A tax computed on the same basis was paid by BTL, except that nothing was included as fee. The parties stipulated that this computation was neither arbitrary nor unreasonable if there was any basis in law or fact for making any allocation to New Mexico of amounts received under their contracts.

The New Mexico Supreme Court upheld the validity of the tax on the grounds that appellants' research activities in the state—tests at White Sands Missile Range—satisfied due process nexus requirements under *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, and *General Motors Corp.* v. *Washington*, 377 U.S. 436, and constituted a "local incident" subject, under the Commerce Clause, to an unapportioned privilege tax on gross receipts therefrom, relying on *General Motors Corp.* v. *Washington, supra.* The Court held, in effect, that it was constitutionally irrelevant that the New Mexico tests were conducted for appellants' own use and that data derived therefrom were not usable until transmitted outside New Mexico, reduced, and analysed in conjunction with data from other research activities in other states.

THE QUESTIONS ARE SUBSTANTIAL

This is the first case to reach the Supreme Court in which due process nexus requirements and state power to tax interstate commerce must be interpreted in the factual context of research activities under research and development contracts with the Armed Services. Manufacturing and selling are not involved. Accordingly, many of the questions presented are matters of first impression in this Court.

The question of New Mexico's power to impose its unapportioned privilege tax on receipts from research activities by federal contractors is important to the state. Several hundred thousand dollars in taxes are directly involved in this action, and millions more will indirectly be governed by the decision herein. White Sands Missile Range and other federal facilities in New Mexico are continuously used for testing and other data-gathering purposes by firms operating under research and development contracts with the Armed Services. The decision herein will determine to what extent the state can reach the proceeds of such contracts under the Emergency School Tax Act or similar statutes imposing an unapportioned tax for the privilege of "engaging in business" in New Mexico.

That question is also important to the Department of Defense, upon which falls the economic burden of the tax under the provisions of the contracts here involved. Such contracts are typical, in this respect, of research and development, cost-plus-fixed-fee, contracts generally. Research activities under such contracts with the Armed Services are widely prevalent throughout the United States. Expenditures by the Department of Defense for such work are presently of the order of magnitude of $7 billion per year.

The questions here involved will also affect the administration of state tax laws throughout the nation. Eleven

states (Alaska, Arizona, Florida, Hawaii, Illinois, Indiana, Louisiana, Mississippi, South Dakota, Washington, and West Virginia) impose unapportioned gross receipts or gross income taxes upon services of the type performed under such contracts.

The decision of the New Mexico Supreme Court raises important questions regarding the interpretation of the Due Process and Commerce Clauses.

1. Under the Commerce Clause the Supreme Court has developed the doctrine that a gross receipts tax, particularly one imposed on the privilege of engaging in business within the taxing state, must, to be valid, be either fairly apportioned or limited to the receipts of a separate local business. The Court has held in such cases as *Cooney* v. *Mountain States Tel. & Tel. Co.*, 294 U.S. 384, and *East Ohio Gas Co.* v. *Tax Commission*, 283 U.S. 465, that an unapportioned tax can be applied to a local business only if the taxpayer could withdraw from such business without withdrawing from related interstate commerce. In *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, the Court required the local business to be "realistically separated" from interstate commerce; in *Joseph* v. *Carter & Weeks Stevedoring Co.*, 330 U.S. 422, the local business was required to be "sufficiently disjoined" from interstate commerce, in order to be subject to a valid unapportioned gross receipts tax. In other cases a "local incident" of interstate commerce has been subjected to a tax on that incident. Compare *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, with *Freeman* v. *Hewit*, 329 U.S. 249. That doctrine reflects a national policy of protecting interstate commerce from multiple state tax burdens, discrimination, and similar obstructions to free trade among the states.

The Court's decision in *General Motors Corp.* v. *Washington, supra*, can, as the dissenting opinions indicate, be

interpreted as effecting a basic change in that well-established interpretation of the Commerce Clause. The New Mexico Supreme Court in the decision below interpreted the *General Motors* case as authorizing an unapportioned tax upon interstate commerce if the tax was "fair", thereby merging the requirement of a "sufficiently disjoined" local business into the requirement of nexus. The Court stated:

> "The only question is whether there is an intrastate incident sufficiently disjoined from interstate commerce, or as stated in the General Motors case—whether New Mexico is exacting a fair demand for that aspect of interstate commerce to which it bears a special relation.
>
> "New Mexico's special relationship to plaintiff's interstate operation is the testing done in New Mexico. The tax being based on receipts due to that testing, the demand (tax) is fair. The activities involved in the testing are sufficiently disjoined from the interstate operation so that those activities are a local incident or business activity. The receipts from that activity can be taxed by New Mexico. Compare General Motors Corp. v. Washington, supra. The tax is not prohibited by the commerce clause [pp. 22–23, *infra.*]"

Appellants believe that the *General Motors* decision was not intended to have the meaning or effect accorded to it by the New Mexico Supreme Court. In that case the Supreme Court adopted the language of *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, that transactions alleged to be interstate must be shown to be "dissociated from the local business"; therefore, it recognized and preserved the doctrine that an unapportioned tax must be limited in application to the receipts of a separate local business. The existence of a local business was admitted in both *General Motors* and *Norton*. The problem in those cases was determining what were the receipts of those businesses, and the taxpayers properly had the burden of "dissociating" the

questioned receipts from the local businesses. The present case is virtually the reverse of those facts: here the receipts have been agreed upon by stipulation, and the root question is whether any local business exists. The New Mexico Supreme Court improperly applied the language of the *General Motors* decision in determining that question; it should have distinguished *General Motors* and *Norton* and have relied upon the earlier authorities noted above in holding that appellants' activities in New Mexico are an integral part of interstate processes and do not constitute a "disjoined" or separate local business.

By giving this case plenary consideration, with briefs on the merits and oral arguments, the Supreme Court can clarify or limit its decision in *General Motors*. It can make clear that that decision was not intended to merge the Commerce Clause requirement of a separate local business into the Due Process Clause requirement of nexus, as the New Mexico Supreme Court concluded in the decision below, but was intended simply to authorize an unapportioned tax upon receipts not shown to be separate from a local business admittedly conducted in Washington. It can reaffirm the Commerce Clause requirement that a gross receipts tax must be either apportioned or confined to the receipts of a separate local business.

The Supreme Court can also define the separate local business requirement in the factual context of the research activities conducted by appellants in New Mexico and other states. The principal question there is whether research activities can constitute a separate local business within the taxing state where the results of such activities are not used in that state to complete performance of the contract. Lack of finality in application of research results opens the door to duplicate taxation by the state in which final use occurs and should, therefore, be grounds for the conclusion that appellant's New Mexico activities cannot constitute a

separate local business for purposes of the Commerce Clause.

2. Under such decisions as *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, and *Scripto, Inc.* v. *Carson*, 362 U.S. 207, the Supreme Court has developed the due process requirement of "nexus" between taxing state and taxpayer in terms of sales or delivery of goods and "exploitation of the consumer market." As the Oregon Supreme Court stated in *American Refrigerator Transit Co.* v. *State Tax Commission*, 238 Ore. 340, 395 P.2d 127: "To establish nexus it is necessary to show that the taxpayer has, in the conduct of his business, taken advantage of the economy of the taxing state to produce the income which is subjected to tax." That formulation does not fit the typical facts of research activities under contracts of the kind held by appellants. In this case the New Mexico "market" is not exploited, and the income taxed does not derive from the "economy of the taxing state." Appellants enter New Mexico to gather information needed to perform contracts outside the state; their receipts are derived outside the state from the United States under the contracts. In every case analogous to this, the courts have held that a foreign firm is not "doing business" within the state where its sole contact is gathering information used outside the state to complete performance of a contract made outside the state. *Seismograph Service Corporation* v. *Bureau of Revenue*, 61 N.M. 16, 293 P.2d 977 (geophysical analysis), *Ford, Bacon & Davis, Inc.* v. *Terminal Warehouse Co.*, 207 Wis. 467, 240 N.W. 796 (appraisal of assets), *Surveyors, Inc.* v. *Berger Bros. Co.*, 9 Conn. Sup. 175 (insurance advice), *Utility Economy Co.* v. *Luders Marine Construction Co.*, 15 Conn. Sup. 213 (public utility consultants), *Haskins & Sells* v. *Kelly*, 77 Kan. 155, 93 Pac. 605 (financial report), *Blackwell-Weilandy Co.* v. *Sabine Supply Co.*, (Tex. Civ. App.) 38 S.W. 2d 654 (sales

catalog), *Law Reporting Co. v. Texas Grain & Elevator Co.*, (Tex. Civ. App.) 168 S.W. 1001 (transcript of ICC hearings), and *Aero Service Corp.* v. *Benson*, 84 Ida. 416, 374 P.2d 277 (topographic maps). Because of the national importance of research and development activities, the Supreme Court should give plenary consideration to this appeal and should formulate due process nexus requirements in terms of such "noncommercial" activities as are involved herein.

3. The final question presented is whether the provisions of Section 72-16-29 and, after January 1, 1966, 72-13-67, authorizing injunctions against defaulting taxpayers' continuing in business, invalidate the Emergency School Tax Act as applied to appellants. In *Underwood Typewriter Co.* v. *Chamberlin*, 254 U.S. 113, the Supreme Court indicated that such a power in the state, although not invoked against the taxpayer, would "open [the statute] to the objection that it compels the company to pay for the privilege of engaging in interstate commerce." That observation was cited with approval in the *Northwestern States Portland Cement* case, *supra*. On that basis the New Mexico Act is fatally defective under the Commerce Clause.

CONCLUSION

For the foregoing reasons appellants believe that the questions presented by this appeal are substantial and of sufficient public importance to warrant plenary consideration.

Respectfully submitted,

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APPENDIX A

Opinion Below

IN THE

Supreme Court of the State of New Mexico

BELL TELEPHONE LABORATORIES, INCORPORATED and DOUGLAS AIRCRAFT COMPANY, INC.
Plaintiffs-Appellants and Cross-Appellees,

vs. No. 7955

BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, CHARLES C. BRUNACINI, Commissioner of Revenue, and CARLOS TRUJILLO, Director, School Tax Division,

Defendants-Appellees and Cross-Appellants.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY SCARBOROUGH, *Judge*

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OPINION

WOOD, Judge, Court of Appeals.

This appeal involves the Emergency School Tax Act (§§ 72-16-1 to 72-16-47, N.M.S.A. 1953). The tax was computed under § 72-16-4.9, N.M.S.A. 1953. BTL. (Bell

Telephone Laboratories, Incorporated) paid the tax for the period March 27, 1961, to August 25, 1963. DAC (Douglas Aircraft Company, Inc.) paid the tax for the period January 1, 1960, to September 30, 1963. The payments were protested.

Proceeding under § 72-16-28, N.M.S.A. 1953 (now repealed), the plaintiffs sought to recover the tax paid. The trial court found the plaintiffs were not entitled to recover the tax so paid, found that DAC was entitled to a refund of the penalty assessed against DAC under § 72-16-22, N.M.S.A. 1953 (now repealed), and except for refund of the penalty, dismissed the complaint with prejudice.

Three issues require a decision: (1) whether plaintiffs are engaged in business under the terms of our statute, (2) whether there has been a violation of the due process requirements of the Fourteenth Amendment to the Constitution of the United States and Article II, § 18, of the Constitution of New Mexico, and (3) whether the tax is in violation of Article I, §8, of the Constitution of the United States—this section giving the Congress the power to regulate commerce among the states.

DAC also asserts that it is not liable for any tax prior to April 1, 1961. It claims that § 72-16-5, N.M.S.A. 1953, as it existed prior to that date, unconstitutionally discriminated against persons dealing with the federal government. DAC did not request a finding of fact on this issue, nor did the trial court rule on this issue. Accordingly, it is not an issue on this appeal. Section 21-2-1 (20)(2), N.M.S.A. 1953; In Re Reilly's Estate, 63 N.M. 352, 319 P.2d 1069.

The United States Department of Army contracted with Western Electric Company, Inc. for the design and development of a missile system. BTL, as an associate of Western Electric Company, Inc., performs Western's obligations as prime contractor. BTL's work consists of design and development of the entire system.

Under purchase orders issued by BTL, DAC works on the design and manufacture of a part of the system. DAC's part pertains to test models of missiles and equipment for their handling and launching.

In the performance of their respective work, BTL and DAC conduct developmental tests of the system and its components. Large-scale tests involving the firing of missiles are conducted in isolated locations for reasons of safety. BTL and DAC have a choice in the location to be used. The choice depends upon the complexity of the test, the nature of the data required and the capabilities and limitations of the location. White Sands Missile Range in New Mexico is selected for tests requiring complete ground instrumentation and recovery of the missile for examination after firing.

BTL and DAC conducted tests in New Mexico on an intermittent basis from 1946 until the early 1950's and on a continuing basis thereafter. Employees of BTL and DAC are assigned to New Mexico for the purpose of conducting the tests.

BTL's New Mexico testing involves the following: the missile, its launch and handling equipment, the guidance system, radars, data collection equipment and other components of the system which are shipped to New Mexico. The components are assembled in New Mexico. The missile is launched. Performance of the system is recorded by telemetry and other data collection procedures. The data are cursorily examined in New Mexico. Data relating to the performance of the guidance system and radars are then sent to BTL's New Jersey laboratory for reduction and analysis.

DAC's New Mexico testing involves the following: the several sections of the missile and all launching and handling equipment are shipped to New Mexico. The compo-

nents are assembled in New Mexico, necessary adjustments are made and the missile is prepared for firing. Performance of the missile in flight is recorded by telemetry and other data collection procedures. Such data are cursorily examined in New Mexico. Data relating to the missile and its launching and handling equipment are then sent to DAC's California plant for reduction and analysis.

Plaintiffs are not New Mexico corporations. Neither company maintains an office in New Mexico. The contract and the purchase order were negotiated and entered into outside New Mexico.

Most of the work done pursuant to the contract and purchase order is done outside of New Mexico. Much of the necessary testing is done outside New Mexico.

The Army furnishes BTL with temporary headquarters for use in connection with the New Mexico tests and BTL furnishes DAC temporary headquarters for the same purpose. The only property of the plaintiffs that is involved is miscellaneous personal property used in connection with the tests. Their employees are in New Mexico only for the tests; however, their average stay is from two to four years.

Apart from their New Mexico testing activities, plaintiffs do not hold themselves out as engaged in business in New Mexico. They do not advertise, sell or distribute goods in New Mexico, nor attempt to obtain any other business in New Mexico.

DAC bills BTL for its work. Western bills the government for BTL's work. The total of bills submitted by both plaintiffs includes costs and fees payable due to activities within New Mexico. The bills rendered do not segregate or attribute any part of the costs or fees to activities within New Mexico or any other state. However, the amount of New Mexico payrolls, some material costs and some items of

indirect costs incurred in New Mexico are ascertainable from the records of the plaintiffs.

DAC's tax was computed on the amount of its payroll expense in New Mexico, its payroll tax on the New Mexico payroll plus 6% of the total of these two items. The 6% is estimated to be the fee earned thereon. BTL's tax was computed on the same basis except that nothing was included as fee. The parties stipulated that this computation was neither arbitrary nor unreasonable if there was a basis for making any allocation to New Mexico of amounts received under the contract and purchase order. They further stipulated that neither California nor New Jersey levy any sales or gross receipts tax on the proceeds of the contract or the purchase order.

Plaintiffs contend that they are neither "engaged" in business nor "doing business" in New Mexico and therefore our tax statute is not applicable. Section 72-16-2, N.M.S.A. 1953,defines these terms as follows:

> "F. 'Business' includes all activities or acts engaged in, personal, professional, and corporate, or caused to be engaged in with the object of gain, benefit or advantage either direct or indirect.
>
> "G. 'Engaging,' when used with reference to engaging or continuing in a business or profession, includes the exercise of corporate or franchise power, but it does not include occasional and isolated sales, or transactions by a person who does not hold himself out as engaged in business."

While the New Mexico testing was at the White Sands Missile Range, no question is raised as to federal jurisdiction over that range. The physical testing occurred within New Mexico. For the dates included within the tax levy, the testing was on a continuous basis. Plaintiffs were doing what they were authorized to do under the contract and purchase order and as often (continuously) as the circum-

stances demanded. They were "engaged" in an activity in New Mexico. Besser Company v. Bureau of Revenue, 74 N.M. 377, 394 P.2d 141.

If the activity is for gain, benefit or advantage, either direct or indirect, it is "business" within the statutory definition. Plaintiffs billed for and were paid for their New Mexico activities. Such payments were a "benefit" within the definition of that term. Webster's Third New International Dictionary; Black's Law Dictionary, Fourth Edition. Plaintiffs were engaged in business within the meaning of the statute.

The claim of violation of due process is that New Mexico "may not constitutionally exercise tax jurisdiction over a person whose only contact with the state is research for use elsewhere." Plaintiffs rely on Seismograph Service Corp. v. Bureau of Revenue, 61 N.M. 16, 293 P.2d 977. That case did not deal with the due process issue.

In Besser Company v. Bureau of Revenue, supra, this court quoted with approval from Wisconsin v. J. C. Penney Co., 311 U.S. 435, 61 Sup. Ct. 246, 85 L. Ed. 267, 130 A.L.R. 1229, on the question of due process. In determining due process we look to see:

> ". . . whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return . . ."

Other decisions hold that due process is met by "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." General Motors Corp. v. Washington, 377 U.S. 436, 84 Sup. Ct. 1564, 12 L.Ed.2d 430; American Oil Co. v. Neill, 380 U.S. 451, 85 Sup. Ct. 1130, 14 L.Ed.2d 1; Miller Bros. Co. v. Maryland, 347 U.S. 340, 74 Sup.Ct. 535, 98 L.Ed. 744.

The New Mexico tax is on the privilege of conducting business. Dikewood Corp. v. Bureau of Revenue, 74 N.M. 75, 390 P.2d 661. It is measured by gross receipts of the business. Section 72-16-4.1, N.M.S.A. 1953. The receipts taxed were receipts based on activities within New Mexico.

The link, or connection, between New Mexico and the transactions it seeks to tax is that all the transactions occurred within New Mexico. What the state gave is the opportunity to engage in those transactions. All the state is doing is seeking a return on those transactions. The taxing power exerted bears a direct fiscal relation to the activities resulting from the opportunity afforded. Imposition of the tax does not violate the requirements of due process.

Plaintiffs assert that their activities in New Mexico constitute either (a) interstate commerce exclusively or (b) an inseparable combination of interstate and intrastate commerce. In either case, they claim the tax may not be constitutionally applied because of the commerce clause. Spector Motor Service v. O'Connor, 340 U.S. 602, 71 Sup.Ct. 508, 95 L.Ed. 573, and Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 74 Sup.Ct. 396, 98 L.Ed. 583, are representative of the cases cited by plaintiffs in support of their assertions.

If there is an intrastate incident sufficiently disjoined from interstate commerce, that incident is open to state taxation. Albuquerque Broadcasting Co. v. Bureau of Revenue, 51 N.M. 332, 184 P.2d 416. Thus, if the facts show that which is taxed to be a local business activity, the tax has been upheld. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 Sup.Ct. 546, 82 L.Ed. 823, 115 A.L.R. 944; Besser Company v. Bureau of Revenue, supra.

General Motors Corporation v. Washington, supra, reviews decisions applying the commerce clause to various types of state taxes. Generally, state property, franchise

and income taxes have been upheld. Local taxes measured by gross receipts from interstate commerce have not fared as well as the other types of tax because of "the danger that such taxes can impose cumulative burdens upon interstate transactions which are not present to local commerce." No issue of "cumulative burdens" or "multiple taxation" is involved in this appeal—it being stipulated that neither California nor New Jersey levy a tax on the gross receipts of the contract or purchase order. We, therefore, expressly do not consider the question of multiple taxation.

The General Motors case involved the constitutional validity, under the commerce and due process clauses, of a Washington tax. This tax was imposed upon the privilege of engaging in business within the state. The receipts on which the tax was levied were unapportioned between in-state and out-of-state activities. Both local and interstate activities were taxed because General Motors failed to prove the interstate activities it claimed to be exempt. In upholding the tax under the commerce clause, the opinion states:

> ". . . [I]t is well established that taxation measured by gross receipts is constitutionally proper if it is fairly apportioned.
>
> "A careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. Where, as in the instant case, the taxing state is not the domiciliary State, we look to the taxpayer's business activities within the State, i.e., the local incidents, to determine if the gross receipts from

sales therein may be fairly related to those activities. . . ."

The court concluded that the Washington tax was levied on a substantial local business in Washington and was constitutionally valid. In so doing, it did not distinguish intrastate business from interstate commerce—part of the tax was applied to interstate activity, because General Motors had not shown that its activities within the state were incidents that the state could not reach. The test stated was whether Washington had exacted a "fair demand for that aspect of interstate commerce to which it bears a special relation."

Justice Brennan dissented in the General Motors case because the tax was not apportioned between in-state and out-of-state activity. His dissent supports the majority opinion that a gross receipts tax on interstate sales is valid if apportioned to the activity within the taxing state. Justice Brennan states:

> ". . . [I]f commercial activity in more than one State results in a sale in one of them, that State may not claim as all its own the gross receipts to which the activity within its borders has contributed only a part. Such a tax must be apportioned to reflect the business activity within the taxing State. . . ."

Here the tax is levied only upon receipts resulting from plaintiffs' activities within New Mexico. There is no question of apportionment between in-state and out-of-state activity.

The only question is whether there is an intrastate incident sufficiently disjoined from interstate commerce, or as stated in the General Motors case—whether New Mexico is exacting a fair demand for that aspect of interstate commerce to which it bears a special relation.

New Mexico's special relationship to plaintiffs' interstate operation is the testing done in New Mexico. The tax being based on receipts due to that testing, the demand (tax) is fair. The activities involved in the testing are sufficiently disjoined from the interstate operation so that those activities are a local incident or business activity. The receipts from that activity can be taxed by New Mexico. Compare General Motors Corp. v. Washington, supra. The tax is not prohibited by the commerce clause.

Plaintiffs assert that Seismograph Service Corporation v. Bureau of Revenue, supra, decided the commerce clause issue and requires an opposite result. In that case the company made geophysical surveys for oil in New Mexico pursuant to contracts entered into outside New Mexico. The survey data were taken to Oklahoma for analysis and formulation of opinions for clients who were principally non-resident. The activities in Seismograph are analogous to activities of the plaintiffs in this case. However, in Seismograph, no part of the company's receipts could be definitely declared as receipts from operations in New Mexico. Here, we have a tax levied only on receipts from New Mexico operations.

Seismograph is not controlling. Interstate activity alone does not decide whether the state can or cannot tax. General Motors Corporation v. Washington, supra. If the local incident is separable from the interstate operation, the state may tax the gross receipts of such local incident.

Plaintiffs contend that their activities in this case cannot be a local business activity since the New Mexico testing is only 5% of their total work under the contract and purchase order. They rely on Combustion Engineering v. Arizona State Tax Com'n, 91 Ariz. 253, 371 P.2d 879. We decline to follow a rule that might find a taxable local

activity if 15% or 25% of the contract was performed in New Mexico and a non-taxable activity if the performance is 5% or 9% of the contract.

Regardless of the percentages involved, the test under the commerce clause is whether the activity within the state is sufficiently local in character to be considered "disjoined" (Albuquerque Broadcasting Co. v. Bureau of Revenue, supra) or a "local incident" (General Motors Corporation v. Washington, supra). This is a question of fact.

The trial court found as a fact that plaintiffs were engaged in a local business activity. The evidence of continuous testing in New Mexico during the periods covered by the tax levy and the evidence of what is involved in that testing support that finding. The fact that the New Mexico testing was a part of an operation involving other states does not destroy the significance of the testing as a local incident within New Mexico—identifiable and capable of being segregated from the interstate operation.

Plaintiffs contend that the tax has been improperly imposed upon them because under § 72-16-29, N.M.S.A. 1953, the state might institute injunction proceedings to prohibit them from continuing in business until required taxes have been paid. They point out that this injunction procedure could be applied to their interstate operation. They conclude that our tax statute is "open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce." No injunction is involved in this case. The question of the propriety of injunction proceedings being interjected as a hypothetical situation, a decision concerning such a proceeding would be an advisory opinion. This court does not give advisory opinions.

Additional arguments advanced by plaintiffs have been considered and found not to have merit.

The judgment is affirmed. IT IS SO ORDERED.

s/ JOE W. WOOD
Judge, Court of Appeals

We Concur:

s/ M. E. NOBLE J.

s/ IRWIN S. MOISE J.

s/ J. C. COMPTON J.

s/ LAFEL E. OMAN J., Ct. App.

APPENDIX B

Statutes Involved

New Mexico Statutes Annotated, 1953 Compilation.—Sections:

72-16-2. Definitions.—When used in the Emergency School Tax [Act], as amended [72-16-1 to 72-16-47].

A. "Person" or "company" includes any individual, estate, trust receiver, business trust, corporation, firm, copartnership, joint adventure, association, or any other group acting as a unit, unless the intention to give a more limited meaning is clearly disclosed by the context, co-operative and foreign corporations, transacting business in this state pursuant to the provisions of sections 45-4-1 through 45-4-32 New Mexico Statutes Annotated, 1953 Compilation, and any municipally owned utility engaged in the proprietary function of selling or furnishing to consumers, electricity or electrical power, natural or artificial gas, or water for domestic, commercial and industrial purposes.

B. "Tax year" or "taxable year" means the calendar year or, when permission is obtained from the bureau of revenue, the taxpayer's fiscal year.

C. "Taxpayer" means any person liable for any tax hereunder.

D. "Gross receipts" means the total sum, not including the taxes imposed by the Emergency School Tax Act, as amended, received as compensation for personal and professional services, for the exercise of which a privilege tax is imposed by the Emergency School Tax Act, as amended, the total receipts of a taxpayer derived from trades, business, commerce, and the gross proceeds of sales as hereinafter defined, except when such taxes are not segregated from such sum, and without any deduction on account of losses or expenses of any kind; Provided that, even though the amount of the tax imposed by the Emergency School Tax Act, as amended, is segregated as set out above, if the taxpayer collects from the customer more than the amount of the tax imposed by the Emergency School Tax Act, as amended, then such amount collected in excess shall be considered as a part of the gross receipts and subject to the tax imposed by the Emergency School Tax Act, as amended.

E. "Gross proceeds of sales" means the sum or value proceeding or accruing from the sale of tangible personal property, including the proceeds from the sale of any property handled on consignment by the taxpayer and including any services that are a part of such sales, but not including the taxes imposed by the Emergency School Tax Act, as amended, unless such taxes are not segregated from such sums or value proceeding or accruing, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature, and also the amount for which credit is allowed by the seller to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest paid, losses, or any other expenses whatsoever; Provided that, even though the

amount of the tax imposed by the Emergency School Tax Act, as amended, is segregated as set out above, if the taxpayer collects from the customer more than the amount of the tax imposed by the Emergency School Tax Act, as amended, then such amount collected in excess of the amount of such tax shall be considered as a part of the gross proceeds of sales and subject to the tax imposed by the Emergency School Tax Act, as amended; Provided further, that cash discounts allowed and taken on sales shall not be included, and gross proceeds of sales shall not include the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit.

F. "Business" includes all activities or acts engaged in, personal, professional, and corporate, or caused to be engaged in with the object of gain, benefit or advantage either direct or indirect.

G. "Engaging," when used with reference to engaging or continuing in a business or profession, includes the exercise of corporate or franchise power, but it does not include occasional and isolated sales, or transactions by a person who does not hold himself out as engaged in business.

H. "Retail" means, except as herein otherwise provided, the sale of tangible personal property for consumption and not for resale in the form of tangible personal property, and "retailer" means every person engaged in the business of making sales at retail.

I. "Consumption" means any use of tangible personal property, goods, wares and merchandise in such a manner that the same shall never again enter trade channels as a commodity or article of merchandise; and "consumer" means any person buying tangible personal property, goods, wares and merchandise for use in such a manner that the same shall not thereafter enter trade channels as

a commodity or article of merchandise for sale, and shall include persons, firms and corporations engaged in the business of contracting as contemplated by section 7 [72-16-4.7] of this 1959 act.

J. "Wholesaler" or "jobber" means any person who sells tangible personal property for resale and not for consumption by the purchaser.

K. "Tax" means the privilege tax.

L. "Location business" means game machines or devices of any character whether or not any element of skill is required in their operation, and includes marble games, pin games, reel games and any other game or device involving skill or chance.

M. "Tax commission" or "state tax commission" means the state tax commission of New Mexico, or any officer, commission, board or bureau that is charged with the administration of the Emergency School Tax Act, as amended. "Bureau" means the bureau of revenue.

72-16-4.1. Privilege taxes levied—Measured by amount of business.—There is levied and shall be collected by the bureau of revenue privilege taxes measured by the amount or volume of business done, against the persons, on account of their business activities, engaging or continuing within New Mexico, in any business as defined in the following twelve [12] sections [72-16-4.2 to 72-16-4.13] of this 1959 act. The amount of the tax shall be determined by the application of the rates provided in the following sections against gross receipts.

72-16-4.9. Privilege taxes—Professional services.—The tax shall be computed at an amount equal to three per cent [3%] of the gross receipts of any person engaging or continuing in the practice of any profession, or of any business in which the service rendered is of a professional,

technical or scientific nature and is paid for on a fee basis, or by a consideration in the nature of a retainer.

72-16-29. Restraining continuance in business until taxes paid.—Any person against whom a tax shall be assessed as herein provided may be restrained and enjoined by proper proceedings instituted in the name of the state of New Mexico by the attorney general or any district attorney of the state of New Mexico, or by the special attorney of the bureau of revenue, if the employment of such special attorney be authorized by enactment of the legislature, at the request of the bureau of revenue, from engaging, or continuing in a business on which a tax is imposed by the provisions of this act [72-16-1 to 72-16-47] until such taxes shall have been paid and until such person shall have complied with the provisions of this act.

72-13-67. Enjoining delinquent taxpayer from continuing in business.—A. In order to ensure or to compel payment of taxes and to aid in the enforcement of the provisions of the Tax Administration Act [72-13-13 to 72-13-92], the commissioner may apply to a district court of this state to have any delinquent taxpayer or person who may be or may become liable for payment of any tax enjoined from engaging in business until he ceases to be a delinquent taxpayer or until he complies with other requirements, reasonably necessary to protect the revenues of the state, placed on him by the commissioner.

B. Upon application to a court for the issuance of an injunction against a delinquent taxpayer, the court may forthwith issue an order temporarily restraining him from doing business. The court shall hear the matter within three [3] days and, upon a showing by the preponderance of the evidence that the taxpayer is delinquent and that he has been given notice of the hearing as required by law, the court may enjoin him from engaging in business in

New Mexico until he ceases to be a delinquent taxpayer. Upon issuing an injunction, the court may also order the business premises of the taxpayer to be sealed by the sheriff and may allow the taxpayer access thereto only upon approval of the court.

C. Upon application to a court for the issuance of an injunction against a person other than a delinquent taxpayer, the court may issue an order temporarily restraining the person from engaging in business. The court shall hear the matter within three [3] days and upon a showing that (1) the person has been given notice of the hearing as required by law, (2) that demand has been made upon the taxpayer for the furnishing of security, (3) that the taxpayer has not furnished security, and (4) that the commissioner considers the collection from the person primarily responsible therefor of the total amount of tax due or reasonably expected to become due to be in jeopardy, the court may forthwith issue an injunction to such taxpayer in terms commanding him to refrain from engaging in business until he complies in full with the demand of the commissioner for the furnishing of security.

D. No temporary restraining order or injunction shall issue by provision of this section against any person who has furnished security in accordance with the provisions of section 56 [72-13-68] of the Tax Administration Act. Upon a showing to the court by any person against whom a temporary restraining order or writ of injunction has issued by provision of this section that he has furnished security in accordance with the provisions of section 56 [72-13-68] of the Tax Administration Act, the court shall dissolve or set aside the temporary restraining order or injunction.

72-16A-1. Gross Receipts and Compensating Tax Act—Short title.—This act [72-16A-1 to 72-16A-19] may be cited as the "Gross Receipts and Compensating Tax Act."

72-16A-2. Purpose.—The purpose of the Gross Receipts and Compensating Tax Act [72-16A-1 to 72-16A-19] is to provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico and to protect New Mexico businessmen from the unfair competition that would otherwise result from the importation into the state of property without payment of a similar tax.

72-16A-3. Definitions.—As used in the Gross Receipts and Compensating Tax Act [72-16A-1 to 72-16A-19]:

A. "Bureau" means the New Mexico bureau of revenue, the commissioner of revenue or any employee of the bureau exercising authority lawfully delegated to him by the commissioner.

B. "Buying" or "selling" means any transfer of property for consideration or any performance of service for consideration.

C. "Contracting" includes, but is not limited to, constructing, altering, repairing or demolishing any:

(1) road, highway, bridge, parking area or related projects;

(2) building, stadium or other structure;

(3) airport, subway or similar facility;

(4) park, trail, athletic field, golf course or similar facility;

(5) dam, reservoir, canal, ditch or similar facility;

(6) sewerage or water treatment facility, power generating plant, pump station, natural gas compressing station or similar facility;

(7) sewerage, water, gas or other pipeline;

(8) transmission line;

(9) radio or other tower;

(10) water, oil or other storage tank;

(11) shaft, tunnel or other mining appurtenance; or

(12) similar work.

"Contracting" also includes:

(13) leveling or clearing land;

(14) excavating earth;

(15) drilling wells of any type, including seismograph shot holes or core drilling; or

(16) similar work.

D. "Engaging in business" means carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit.

E. "Gross receipts" means the total amount of money or the value of other consideration, received from selling property in New Mexico, from leasing property employed in New Mexico or from performing services in New Mexico, and includes any type of time-price differential and receipts from sales of property handled on consignment but excludes cash discounts allowed and taken.

In an exchange in which the money or other consideration received does not represent the value of the property or service exchanged, "gross receipts" means the reasonable value of the property or service exchanged.

When the sale of property or service is made under any type of charge, conditional or time sales contract or the leasing of property is made under a leasing contract, the seller or lessor may elect to treat all receipts under such contracts as gross receipts as and when the payments are actually received. If the seller or lessor transfers his interest in any such contract to a third person, he shall pay the gross receipts tax upon the full sale or leasing contract amount.

"Gross receipts," for the purposes of the business of buying, selling or promoting the purchase, sale or leasing,

as factor, agent or broker, on a commission or fee basis, of any property, service, stock, bond or security, includes only the total commissions or fees derived from the business.

F. "Manufacturing" means combining or processing components or materials to increase their value for sale in the ordinary course of business but does not include contracting.

G. "Person" means any:

(1) individual, estate, trust, receiver, co-operative association, club, corporation, company, firm, partnership, joint venture, syndicate or other entity, including any gas, water or electric utility owned or operated by a county, municipality or other political subdivision of the state.

H. "Property" means real property or tangible personal property. Tangible personal property includes electricity.

I. "Leasing" means any arrangement whereby, for a consideration, property is employed for or by any person other than the owner of the property.

J. "Service" means all activities engaged in for other persons for a consideration, which activities involve primarily the performance of a service as distinguished from selling property. "Service" includes contracting and all materials employed in contracting are to be treated as part of the service. However, sales of materials that will be employed in contracting to persons engaged in contracting are sales of tangible personal property.

K. "Use" or "using" includes use, consumption or storage other than storage for subsequent sale in the ordinary course of business or for use solely outside this state.

72-16A-4. Imposition and rate of tax—Denomination as "gross receipts tax."—A. For the privilege of engaging in

business, an excise tax equal to three per cent [3%] of gross receipts is imposed on any person engaging in business in New Mexico.

B. The tax imposed by this section shall be referred to as the "gross receipts tax."

72-16A-5. Presumption of taxability—Gross receipts tax.—To prevent evasion of the gross receipts tax and to aid in its administration, it is presumed that all receipts of a person engaging in business are subject to the gross receipts tax. Any person engaged solely in transactions specifically exempt under the provisions of the Gross Receipts and Compensating Tax Act [72-16A-1 to 72-16A-19] shall not be required to register or file a return under this act [72-16A-1 to 72-16A-19].